Case No. 83-131

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation,
Petitioner,

v.

ARTHUR FREDERICK GOODE, III.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER FILED PURSUANT TO SUPREME COURT RULE 22.6

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QUESTIONS PRESENTED

1. WHETHER A FEDERAL CIRCUIT COURT OF APPEALS MAY REJECT A STATE APPELLATE COURT'S FINDING OF FACT PURSUANT TO TITLE 28 U.S.C. §2254 (d)(8), AS NOT BEING FAIRLY SUPPORTED BY THE RECORD AS A WHOLE, SIMPLY BECAUSE THE CIRCUIT COURT OF APPEALS DISAGREES WITH THAT FINDING.

2. WHETHER A FEDERAL DISTRICT COURT'S FINDING OF FACT, WHILE SITTING IN HABEAS, IS SUBJECT TO THE CLEARLY ERRONEOUS RULE OF RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

3. WHETHER, ONCE THE SENTENCING AUTHORITY IN A CAPITAL CASE FINDS ONE OR MORE VALID STATUTORY AGGRAVATING CIRCUMSTANCES TO EXIST IT IS CONSTITUTIONALLY IMPERMISSIBLE FOR THE SENTENCING AUTHORITY TO ALSO CONSIDER NON-STATUTORY AGGRAVATING CIRCUMSTANCES RELEVANT TO THE DEFENDANT'S CHARACTER AND PROPENSITY TO COMMIT MURDER.

4. WHETHER, GIVEN THE FACT THAT THE SENTENCING AUTHORITY MAY HAVE CONSIDERED AN IMPROPER AGGRAVATING FACTOR IN SENTENCING A DEFENDANT TO DEATH, A COURT OF APPEALS MAY SET ASIDE THAT SENTENCE AS ARBITRARY AND CAPRICIOUS WHERE THE FLORIDA SUPREME COURT INDEPENDENTLY REVIEWED AND REWEIGHED THAT SENTENCE AND DETERMINED IT TO BE PROPER EVEN ABSENT THE PERMISSIBLE AGGRAVATING CIRCUMSTANCES.

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PRELIMINARY STATEMENT

Petitioner files this Supplemental Brief pursuant to Supreme Court Rule 26.6 for the purpose of calling attention to a new case decided by this Honorable Court on July 6, 1983: Barclay v. Florida,

Case No. 81-6908, as reported in 33 Cr. L. 3292 which was decided while this Petitioner's Petition For Writ of Certiorari was at the printer.

ARGUMENT

The decision of the Court of Appeals, Eleventh Circuit, in the instant case, is in direct conflict with the above cited decision in the following particulars; inter alia:

The Eleventh Circuit held that Florida may not constitutionally impose a sentence of death when one of the aggravating circumstances relied upon by the trial judge was not among those established by the Florida death penalty statute. In Barclay, this Court held otherwise. In the instant case, as in Barclay, there were other statutory aggravating circumstances that supported the death sentence. In Barclay the

trial judge ". . . in explaining his sentencing decision, discussed the racial motive for the murder and compared it with his own experiences in World War II . . ." (33 Cr. L. 3295, 3294).

In the instant case, the trial judge also, in explaining his sentencing decision, discussed the fact that Goode could not be rehabilitated and would kill again. Accepting for the moment, the Eleventh Circuit's conclusion that the trial judge's "discussions" constituted consideration of this "recurrance" factor as a non-statutory circumstance, the decision of the lower court is hopelessly in conflict with Barclay. In Barclay this court held that consideration of non-statutory factors, while they might violate state sentencing procedures, did not rise to constitutional proportions. In Goode the lower court said it did.

Although the Eleventh Circuit has attempted to categorize Goode as a unique* case, contending that no other capital defendant in Florida has or will be sentenced to death through consideration of this "recurrence" factor, Goode has been the controlling authority relied upon by the Eleventh Circuit in setting aside other, not so unique death sentences: Moore v. Balkcom, 709 F. 2d 1353 (11th Cir. 1983), Foster v. Strickland, _____F. 2d_____(11th Cir. 1983) Case No. 81-5734.

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* Goode's case is not as unique as the lower court would have us believe. There have been other sentences of death in Florida where similar recurrance factors have been considered: Proffitt v. State, 315 So. 2d 461 (Fla. 1975), Vaught v. State, 410 So. 2d 147 (1982), Sullivan v. Wainwright, 695 F. 2d 1306 (11th Cir. 1983).

In Moore, as occurred in Goode the trial judge had made specific findings with respect to statutory aggravating circumstances and then proceeded to editorialize with respect to why the sentence of death was proper i. e. that the killing occurred in the sanctity of the victim's home. Id. at 1358. Citing Goode, the Eleventh Circuit held that although the statutory aggravating circumstance found by the trial judge ". . . was itself sufficient to support a death sentence under Georgia law and was supported by the record" Id. at 1358 the judges comments constituted consideration of an improper non-statutory aggravating circumstance by him.

In Foster the Eleventh Circuit, extending Goode cited it for the proposition that failure to follow state procedures, even though they may be

matters involving state law, will reach constitutional dimensions whenever the Eighth Amendment is involved, Id. footnote 16, regardless whether or not it results in arbitrariness or capriciousness.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Petitioner, and member of the Bar of the United States Supreme Court, hereby certify that on the _____day of _____, 1983, I served three copies of the Supplemental Brief of Petitioner Filed Pursuant to Supreme Court Rule 22.6 on Wilbur C. Smith, III, Smith, Carta, Ringsmuth & Kluttz, P. O. Box 2446, Fort Myers, Florida 33902-2446, by a duly addressed envelope with postage prepaid.

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